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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

DAVID BOWER and JODY ATWOOD,

Plaintiffs,

v.

TEMPLE MOUNTAIN ENERGY, INC.; TME
ASPHALT RIDGE, LLC; LARRY CLYNCH;
WILLIAM MESSERLI; JAMES RUNQUIST;
WILLIAM SCOTT; ROBERT TRENT;
CLINTON W. JURGENS; and RICHARD
LECY,

Defendants.

**ORDER AND
MEMORANDUM DECISION**

Case No. 2:09-CV-1141-TC

Judge: Tena Campbell

WILLIAM SCOTT,

Crossclaim Plaintiff,

v.

TEMPLE MOUNTAIN ENERGY, INC.; TME
ASPHALT RIDGE, LLC; LARRY CLYNCH;
WILLIAM MESSERLI; JAMES RUNQUIST;
ROBERT TRENT; CLINTON W. JURGENS;
and RICHARD LECY,

Crossclaim Defendants.

On May 25, 2011, the Court held a hearing on the following motions:

- Defendant William Scott’s Rule 12(c) Motion for Judgment of Plaintiffs’ Amended Complaint on the Pleadings (“Scott’s Motion for Judgment on the Pleadings”) (Docket No. 64);
- Defendant Temple Mountain Energy, Inc.; TME Asphalt Ridge, LLC; Larry Clynch; William Messerli; Jimmy Runquist; Robert Trent; Clinton W. Jurgens and Richard Lecy’s Rule 12(c) Motion for Judgment on the Pleadings (“TME Defendants’ Motion for Judgment on the Pleadings”) (Docket No. 62);
- Plaintiff’s Motion to Amend Complaint (Docket No. 71); and
- Plaintiff’s Motion to Certify Issues to the Utah Supreme Court (Docket No. 69).

At the hearing, Plaintiffs David Bower (“Bower”) and Jody Atwood (“Atwood”) were represented by Robert H. Wilde. Defendants Temple Mountain Energy, Inc. (“TME”), TME Asphalt Ridge, LLC (“TME Asphalt Ridge”), Larry Clynch (“Clynch”), William Messerli (“Messerli”), James Runquist (“Runquist”), Robert Trent (“Trent”), Clinton W. Jurgens (“Jurgens”) and Richard Lecy (“Lecy”) (collectively the “TME Defendants”) were represented by Scott M. Petersen. Defendant William Scott (“Scott”) was represented by Robert O. Rice and Fredrick R. Thaler. Based on the briefings submitted by the parties, arguments of counsel at the hearing, and good cause appearing, the Court hereby **ORDERS** as follows:

PROCEDURAL BACKGROUND

1. On or about December 10, 2010, Plaintiffs filed their Amended Complaint setting forth the following causes of action:
 - a. First Cause of Action – Breach of Contract;
 - b. Second Cause of Action – Breach of Implied Covenant of Good Faith and Fair Dealing;
 - c. Third Cause of Action – Utah Labor Code Wage Claim (Utah Code § 34-28-5);
 - d. Fourth Cause of Action – Utah Labor Code Attorneys Fees (Utah Code § 34-27-1);

- e. Fifth Cause of Action – Promissory Estoppel;
- f. Sixth Cause of Action – Overtime/Minimum Wage Violation, Fair Labor Standard Act, 29 U.S.C. § 201, et seq.
- g. Seventh Cause of Action – FLSA Retaliation Against Defendant Scott.

2. On or about December 27, 2010, the TME Defendants filed their Answer to Plaintiffs’

Amended Complaint.

3. On or about December 22, 2010, Scott filed his Answer to Amended Complaint and

Crossclaim of William Scott. In his Crossclaim, Scott set forth the following claims:

- a. First Cause of Action – Breach of Contract Against TME;
- b. Second Cause of Action – Violation of the FLSA against TME, Clynch, Messerli, Runquist, Trent, Jurgens and Lecy;
- c. Third Cause of Action – Lien Foreclosure
- d. Fourth Cause of Action – Allocation of Fault Under Utah Labor Code Wage Claim (Utah Code § 34-28-1, et seq.);
- e. Fifth Cause of Action – Allocation of Fault Under Utah Labor Code Attorneys Fees (Utah Code § 24-27-1);
- f. Sixth Cause of Action – Allocation of Fault Under Utah Liability Reform Act (Utah Code § 34-28-2 and § 34-27-1);
- g. Seventh Cause of Action – Joint and Several Liability Under FLSA;
- h. Eighth Cause of Action – Declaratory Judgment.

It is hereby **ORDERED** as follows:

- 1. Scott’s and the TME Defendants’ Motions for Judgment on the Pleadings are ***granted*** as to Plaintiffs’ Sixth Cause of Action (FLSA Violation), and the Court hereby ***dismisses with prejudice*** that claim. The Court dismisses the Plaintiffs’ FLSA claim against all Defendants with prejudice because Plaintiffs are exempt employees under

29 U.S.C. § 213(a)(1). It was agreed and understood that the Plaintiffs would be paid on a salary basis. The allegation that Plaintiffs were at times not paid their salary, is no basis for determining that the Plaintiffs are non-exempt under the Fair Labor Standards Act.

2. The Court **grants** the Scott's Motion for Judgment on the Pleadings as to Plaintiffs' Seventh Cause of Action (FLSA Retaliation against Scott) and **dismisses with prejudice** that claim. The Court dismisses Plaintiffs' retaliation claim because, under the case law, legislative history and provisions of the FLSA, the purpose of the FLSA is to protect an employee who wishes to file a grievance. Therefore, it is implicit that there must be an employer-employee relationship between the plaintiff and the defendant who allegedly retaliated at the time of the alleged adverse action. Furthermore, Scott's right to crossclaim against Bower is protected by the United States and Utah Constitutions. U.S. Const. Amend. 1; U.C.A. 1953, Const. Art. 1, § 11.
3. Scott's Second Cause of Action (FLSA Violation) and Seventh Cause of Action (Joint and Several Liability Under the FLSA) against the TME Defendants are hereby **dismissed with prejudice**.
4. The Court hereby **denies as moot** Plaintiff's Motion to Amend Complaint and Motion to Certify Issues to the Utah Supreme Court.
5. Pursuant to 28 U.S.C. § 1367(a), the Court declines supplemental jurisdiction over any and all remaining claims by any party against any other party, and hereby **dismisses**

those claims *without prejudice*.

DATED this 6th day of June, 2011.

BY THE COURT:

A handwritten signature in black ink that reads "Tena Campbell". The signature is written in a cursive, flowing style.

The Honorable Judge Tena Campbell
United States District Court Judge

APPROVED AS TO FORM:

/s/ Robert H. Wilde

Robert H. Wilde

Counsel for Plaintiffs

(signed with approval of Robert H. Wilde via email)

/s/ Scott M. Petersen

Scott M. Petersen

Counsel for TME Defendants

(signed with approval of Scott M. Petersen via email)